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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 301

IN THE MATTER OF
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

FLORENCE G. HICKS AND N. E. CATLIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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September 9, 1942.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals of April 8, 1942 (R. 218-225) is reported in 127 Fed. (2nd) 1001. Rehearing was denied on June 9, 1942 (R. 227).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 8, 1942 (R. 226). A petition for rehearing was filed and denied on June 9, 1942 (R. 227). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935 (28 U. S. C. A. Section 347 (a)).

Statement of the Case.

This case arose on a petition filed on December 4, 1937, by plaintiffs Hicks and Catlin (respondents before this Court and hereinafter referred to as such) in railroad reorganization proceedings pending in the District Court of the United States for the Northern District of Illinois. The defendants named therein were the Trustee of the Chicago & North Western Railway Company and James E. Lockwood, Jr. (petitioners before this Court and hereinafter referred to as such). Respondents, as successors in interest of parties who had conveyed an interest in certain property to the railway company and its predecessor for use as a right of way, sought to recover possession of this property or, in the alternative, to enjoin the use of a portion of said property for a private gasoline filling station on the ground that the conveyances gave the grantees only an easement. The portion of the railroad right of way just referred to had been leased by the railroad company to said Lockwood for such use and at the time of the hearing it was being so used. Said filling station, however, had not been constructed at the time the respondents filed their petition (R. 2-9).

The matter was heard before a special master, who issued a report concluding that the railroad company had acquired a fee title to the land in 1863 and that the petition should be dismissed (R. 151-185). This report was affirmed by the

district court without discussion of the facts and law (R. 193-195). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On April 3, 1940, that Court handed down an opinion affirming the lower court (R. 210). This opinion was rendered under a mistaken belief that under the Illinois law no consideration could be given to the habendum of the 1863 deed to the railroad (see pages 8 and 9 hereof). The Court's error was pointed out on petition for rehearing and the court subsequently, on January 3, 1941, withdrew its opinion and vacated its judgment (R. 217). On April 8, 1942, the Circuit Court of Appeals handed down its second opinion, in which it held that the 1863 deed to the railroad conveyed an easement only, that under that easement the railroad could use the property only for railroad purposes, and that the use of the property by petitioner James E. Lockwood for a retail gasoline filling station was an improper use (R. 218-225). It is this decision in favor of respondents that the petitioners are here seeking to have reviewed.

Briefly, the facts are as follows:

On June 19, 1863, Mary A. Camp, the owner of a 71-acre tract of farm land situated near Rockford, Illinois (R. 95), made a deed to the Trustee of the Kenosha, Rockford and Rock Island Railroad Company covering two strips of land beginning at the northerly boundary of the tract referred to and extending southerly a distance of 502 feet, 50 feet in width, on each side of the center line of the track of said railroad as the same was then laid out on the land mentioned (R. 98). The strips contained a total of 1.15 acres and the grantee agreed to make and maintain a fence on either side of the premises and all necessary crossings at grade. The habendum in this deed, which will be hereinafter referred to as the "Camp deed," provided that the grantee was to have and to hold the land "to the only proper use, benefit and behoof of the second party and his successors forever for railroad purposes only." Whatever

rights were acquired under this deed were transmitted by succession to petitioner Charles M. Thomson, Trustee of the Chicago & North Western Railway Company.

The strips of land conveyed by the Camp deed were part of the larger 71-acre tract referred to, and at the time that deed was given Mary A. Camp owned the land on either side of the strips described in the Camp deed (R. 95). The entire tract owned by her is represented on Trustee's Exhibit A (R. 135) by the property lying south of Spring Creek Road. This exhibit also shows the location of the railroad right of way and the portion thereof leased to petitioner Lockwood for the gasoline filling station. The property shown on this exhibit was subdivided into lots by respondent Hicks' predecessor and respondent Catlin subsequent to March 2, 1905 (R. 93).

On November 20, 1865, Mary A. Camp conveyed the entire 71-acre tract to Lysander C. Jacoby. This conveyance described the tract by metes and bounds and included the strips of land conveyed by the Camp deed (R. 100-103). There was excepted from the warranty in this deed, *but not from the conveyance*, "certain rights of the railroad in 1.15 acres thereof" (R. 102).

On December 20, 1870, Jacoby made a deed to the Chicago & North Western Railway Company (R. 103) which covered substantially all of the strips conveyed by the Camp deed plus some additional strips. This deed stated that the conveyance was made "for the uses and purposes hereinafter stated and none other" and described the property as "a strip of land 50 feet wide and no more extending on and along the westerly side of the center line of the track of said railway as now laid down and used by the party of the second part *upon the hereinafter described premises of the grantors* and also a strip of land unequal in width extending from the easterly line of the strip aforesaid • • • both of said strips of land to extend from the said half section line to the southern line of the grantors' premises

whereof they are a parcel." (Italics ours.) The habendum of this deed provided that the railroad was "to have and to hold the said strips of land above specified and described and to the party of the second part, its successors and assigns, for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken and held by condemnation under the statute and subject also to all obligations and liabilities imposed on railroad companies respecting land taken and held by such condemnation" (R. 104).*

On September 3, 1877, Jacoby conveyed the entire 71-acre tract by metes and bounds to his daughters. No reservation as to the rights of the railroad company was made in this deed (R. 108).

On August 3, 1904, one of the Jacoby daughters conveyed the entire 71-acre tract to the other. The description was by metes and bounds and again no reservation was made as to the rights of the railroad (R. 110).

On March 2, 1905, the title to the 71-acre tract was acquired by Herbert S. Hicks and respondent N. E. Catlin, strangers to the Jacoby family, under a deed containing a metes and bounds description. This deed provided that the conveyance was made "subject to the right of way of the Chicago and Northwestern Railway Co. * * *" (R. 112). Herbert S. Hicks was the husband of petitioner Florence G. Hicks. He died prior to the beginning of this suit leaving a will by which he devised to his wife all of his property.

On October 2, 1937, the Railway Company leased a portion of the right of way conveyed by the Camp deed to petitioner James E. Lockwood, Jr., for use as a gasoline filling station" (R. 117-128). The property leased consisted of a portion of the right of way described in the Camp deed and the Jacoby deed to the railroad

*This deed clearly conveyed only an easement to use the property for railroad purposes. See footnote, page 20, *infra*.

averaging about 275 feet in length except 8½ feet on each side of the center of the railroad tracks through the property. The tanks located thereon are old tank cars set on concrete blocks. They are not bulk station tanks. There are no loading racks or pumps for the loading of gasoline out of these tanks. The tanks bear a notation that the station is a "tank car station" and are only used for advertising and for the storage of reserve gasoline for the adjoining station.

Immediately upon learning of this lease counsel for respondents notified petitioner, James E. Lockwood, of respondent's rights in the property covered by the lease (R. 5-7) and on November 16, 1937, filed a suit in the Circuit Court of Winnebago County, Illinois, to restrain said lessee from completing a retail gasoline filling station on said premises which was then in the process of being constructed. This suit was dismissed because an injunction theretofore issued in the railroad reorganization proceeding involving petitioner railway restrained all persons from interfering with the property of the railway and from prosecuting suits against the railway company except in the Federal District Court (R. 7-8). Respondents thereupon filed the petition in the District Court referred to in the opening paragraph of this statement.

Questions Presented.*

1. Whether under the Illinois law the Camp deed to the railroad conveyed only an easement.

2. Whether, assuming only an easement was conveyed, the property can be used for a private retail gasoline filling station by a lessee from the railroad.

* A further question, namely whether the 1870 deed to the railroad, which covered substantially the same property as the Camp deed and which clearly conveyed an easement, superseded the Camp deed, was also presented to the Circuit Court of Appeals. That court, in the opinion here sought to be reviewed, did not pass on this question. Such a ruling was unnecessary in view of its conclusion as to the proper construction of the Camp deed. Accordingly, we shall not discuss this question in this brief.

SUMMARY OF ARGUMENT.

I.

THE COURT BELOW CORRECTLY HELD THAT THE CAMP DEED CONVEYED ONLY AN EASEMENT.

(a) The Circuit Court of Appeals properly applied the rules of construction laid down in *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, in arriving at its conclusion that the Camp deed conveyed only an easement.

(b) The Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 312, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, relied upon by petitioners, do not support the proposition that the Camp deed conveyed a fee.

(c) Even assuming the language of the Camp deed is ambiguous (which we do not admit), the Circuit Court of Appeals correctly found that the Camp deed conveyed only an easement under the doctrine of *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516.

II.

THE USE OF THE PROPERTY IN QUESTION FOR A RETAIL GASOLINE FILLING STATION BY A LESSEE FROM THE RAILROAD IS NOT A PROPER USE.

(a) The Circuit Court of Appeals correctly followed the rule approved in *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, in determining that the use of the property in question for a retail gasoline filling station is not a railroad use.

(b) The cases of *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, *Dauchy Iron Works* v. *Grunder*, 150 Ill. App. 604, and *Dickman* v. *Madison County Light Co.*, 304 Ill. 470, cited by petitioners, are inapplicable to this case.

ARGUMENT.

The petitioners assert as reasons for the allowance of writ of certiorari herein that the Circuit Court of Appeals has decided important questions of Illinois law incorrectly and has reached a result contrary to its own previous conclusion in this case. We will show that the Circuit Court of Appeals in the decision here sought to be reviewed reached the only possible result under the applicable Illinois authorities, and that its two opinions are completely consistent, except that in its earlier and now withdrawn opinion it followed a rule of law inapplicable to this case on the facts and for the applicability of which petitioners do not even now contend.

I.

THE COURT BELOW CORRECTLY HELD THAT THE CAMP DEED CONVEYED ONLY AN EASEMENT.

At the outset of their argument petitioners refer to the first opinion of the Circuit Court of Appeals (R. 210) in which the Court concluded that the Camp deed conveyed a fee, basing its decision on the legal proposition that where the granting clause of a deed contains language broad enough to convey a fee, the estate conveyed cannot be cut down or limited by the habendum (R. 214).

As is recognized in the Court's second opinion here sought to be reviewed, this proposition applies only where the granting clause contains the word "heirs" or definitely describes the estate granted. Where, as in the instant case, words of inheritance are not used and there is nothing in the granting clause definitely defining the estate granted, the habendum or any other part of the deed may be resorted to for the purpose of determining the estate granted and that in such a case the habendum may create less than a fee where the granting clause

standing alone would convey a fee. This is well settled in Illinois. Thus, in *Bear* v. *Millikin Trust Co.*, 336 Ill. 366, the Illinois Supreme Court in construing a deed to a corporation as trustee said (pp. 380-381):

> "The rule applicable to common law deeds with a granting clause containing the word 'heirs,' that the first of two repugnant clauses shall prevail, does not apply to this deed, in which the estates are not so limited. *In a deed in which words of inheritance are not used the entire context of the instrument may be considered, and every word used, wherever found, must, if possible, give weight in determining the estate granted.*"* (Italics ours.)

This rule was authoritatively restated by the Illinois Supreme Court twice during the two-year period intervening between the first and second opinions of the Circuit Court of Appeals in this case. *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 521-522; *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, 443-444. Petitioners apparently concede that it is applicable here (See Petition, pp. 10-11).

We wish to emphasize that, once the applicability of this rule and the inapplicability of that relied upon by the Circuit Court of Appeals in its first opinion is recognized, any alleged conflict between the two opinions disappears. Even in its first opinion the Circuit Court of Appeals made clear that, if the habendum could be given effect, the Court would hold that the Camp deed created only an easement. The first opinion stated (R. 214): "In our case * * * the words used in the habendum, if given effect, would create an easement only * * *." Thus under the rule that the habendum clause must be given effect, which petitioners do not challenge, the two opinions of the Circuit Court of Appeals are completely consistent in holding that the Camp deed conveyed only an easement.

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*Other cases to the same effect are *Anderson* v. *Stewart*, 285 Ill. 605, 611-612; *Buck* v. *Garber*, 261 Ill. 378, 382-384; *Riggin* v. *Love*, 72 Ill. 553, 555-556; *Patterson* v. *McCay*, 313 Ill. 491, 492-493; *Harder* v. *Matthews*, 309 Ill. 550, 552; *Bauman* v. *Stoller*, 235 Ill. 480, 489-93; *Cover* v. *James*, 217 Ill. 309, 312-314; *Walker* v. *Shepard*, 210 Ill. 100, 111; and *Welch* v. *Welch*, 183 Ill. 237, 238.

(a) The Circuit Court of Appeals Properly Applied the Rules of Construction laid down in Tallman v. E. I. & P. R. R. Co., 379 Ill. 441, in Arriving at Its Conclusion That the Camp Deed Conveyed Only an Easement.

Petitioners urge that the Circuit Court of Appeals in its second opinion placed unwarranted significance on the Illinois Supreme Court's decision in *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441. Their argument is predicated principally on the proposition that the language of the deed there under consideration is not precisely the same as that of the Camp deed. We do not contend that it is. We do, however, contend that the principles of construction laid down in that case are equally applicable here and that the Circuit Court of Appeals correctly applied those principles.

In the *Tallman* case the Illinois Supreme Court, after carefully reviewing its prior decisions dealing with the rules of construction applicable to deeds in Illinois, concluded as follows (pp. 453-454):

> "* * * The principle is also clearly stated in *Bauman* v. *Stoller*, 235 Ill. 480, as follows: 'The words of grant, "convey and warrant," convey the fee unless they are limited to a lesser estate by words found in the granting clause or in the *habendum* of the deed, if it contained an *habendum*. * * * where there is language, either in the granting clause or in the *habendum* of the deed, limiting the estate conveyed by such granting words to one less in extent than a fee, such words of limitation will be given effect.'
>
> "The rule that a fee simple is deemed to have been conveyed applies when the 'estate' to be conveyed is ascertained. The 'estate' is not ascertained by the use of the words 'convey and warrant' alone. The entire deed must be examined to ascertain what 'estate' the parties intended to convey. We therefore examine all of the words of the granting clause, *viz.*,—'convey and warrant * * * as and for its right of way a strip of land 100 feet wide * * * over and across' the de-

scribed land, and ascertain the 'estate' intended to be conveyed, that is, whether a *use* of the land, or *all* of the land, and when that intention is found, in accordance with the rules of construction referred to above, we apply the statute to any other language which may affect the estate described in the granting clause. When we do this, general purpose words which do not describe a tenure or estate will not cut down the estate, but words which do describe a tenure or estate may not be disregarded as merely descriptive of a purpose, but must be examined in the light of the entire instrument, and, if descriptive of the thing granted, must be given effect.

"Applying the above principles, we are of the opinion the description of the estate contained in the granting clause is that of a right of way easement, and not a fee simple interest in the land within the described boundaries. Such construction gives effect to all of the words in the deed. Any other construction would require us to disregard words necessary to determine the estate granted."

In the Illinois Supreme Court's decision in *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, which was cited and relied upon in the *Tallman* case, the Court said (pp. 521-522):

"The deed in question is in the form prescribed by section 9 of the Conveyances act (Ill. Rev. Stat. 1939, chap. 30, par. 8, p. 796), containing no words which at common law would convey an estate of inheritance. Section 13 of the act provides that a deed in this form will be deemed to have conveyed a fee simple estate of inheritance if a less estate is not limited by express words, or does not appear to have been granted by construction or operation of law. *The manifest meaning of the latter section is, that when words of inheritance are not used, every word, no matter where situated in the deed, is to be given weight in determining the estate granted.* (*Woods* v. *Seymour, supra; Bear* v. *Millikin Trust Co.*, 336 Ill. 366.) Whether a fee, if clearly granted, is subject to forfeiture by reason of language subsequently restrict-

> ing its use, is recognized in the application of this section as a question distinct from the issue, here presented, whether an estate less than a fee is essentially described in the words of limitation. (*Branch* v. *Central Trust Co.*, 320 Ill. 432; *Harder* v. *Matthews*, 309 id. 548; *Bauman* v. *Stoller*, 235 id. 480.) The doctrine applied in the former instance, that words following the grant, apparently reducing the estate conveyed, will be disregarded as repugnant to the words of conveyance, (*King* v. *Lee*, 282 Ill. 530; *Bald* v. *Nuernberger*, 267 id. 616; *Downen* v. *Rayburn*, 214 id. 342); has no application to the latter instance, *where the granting clause specifies no estate*, and the words of limitation may be construed as declaratory of the intention, so that the deed, taken as a whole, conveys the lesser estate. *Bauman* v. *Stoller, supra; Cover* v. *James*, 217 Ill. 309. (Italics ours.)

The principles established in the *Tallman* and *West* cases are equally applicable to the instant case. The Camp deed uses the words "remise, release, sell, convey and quitclaim" (R. 98). These words, like "convey and warrant" discussed in the *Tallman* case, do not alone ascertain an estate. They are entirely consistent with a grant of an easement. Furthermore, the words "or his Successor forever" used in the granting clause of the Camp deed are clearly not words of inheritance which if used would describe an estate. *Baker* v. *Scott*, 62 Ill. 86, 97; *Brelie* v. *Klafter*, 342 Ill. 622, 628; *West* v. *Fitz*, 109 Ill. 425, 436; *Coogan* v. *Jones*, 278 Ill. 279, 282; *Metzen* v. *Schopp*, 202 Ill. 275, 284; *Patterson* v. *McCay*, 313 Ill. 491, 492, 494; Kales, Future Interests, 2nd Ed. § 11. The only technical words of inheritance at common law contained the word "heirs." Tiffany, Real Property (2nd ed.), section 21. Even assuming that the word "or" in the Camp deed should be read as "and," the reference to "successor forever" does not indicate that the deed was intended to convey a fee. Easements are frequently granted in perpetuity.

The language of the Camp deed as a whole does, however, clearly indicate that the parties intended that only an easement be granted. The habendum clause expressly provided that the grantee should have the land "for railroad purposes only." Furthermore, the deed, which was given after the railroad tracks were already laid across the property (R. 98), contains covenants with respect to maintaining fences on either side of the premises and the maintaining of "all necessary crossings at grade." Obviously, the property was to be used for a right of way. To hold that a fee was conveyed by the Camp deed would be to ignore this fact and the word "only" contained in the habendum and to violate the cardinal rule of construction applicable to the Camp deed. This rule, which requires that the intention of the parties as disclosed by the entire instrument be carried out and that where possible each word and clause be given effect, was stated in the *Tallman* case in the following language (379 Ill. 441, 444):

> "* * * The cardinal and all-important one (rule) is to ascertain the intention of the parties, and such deed should be so construed as to carry out the intention as gathered from the entire instrument, and the purpose, if legal, should be carried into effect so as not to defeat the manifest intention; (*Magnolia Petroleum Co.* v. *West,* 374 Ill. 516; *Woods* v. *Seymour,* 350 id. 493;) and every word and clause within the instrument should be considered, and if possible given effect. *Lehndorf* v. *Cope,* 122 Ill. 317; *Woods* v. *Seymour, supra.*"

Petitioners contend that nothing the Illinois Supreme Court has said in the *Tallman* case "may be construed to mean that a statement of *use* 'denotes a tenure by which land is held.'" In so doing, they apparently overlooked the quotation from that case appearing on pages 10 and 11 hereof where the court said: "We therefore examine all of the words of the granting clause, * * * and ascertain the 'estate' intended to be conveyed, that is,

whether a *use* of the land, or *all* of the land, and when that intention is found, in accordance with the rules of construction referred to above, we apply the statute to any other language which may affect the estate described in the granting clause." Thus if it appears that the "use" only was granted, the estate conveyed is an easement rather than a fee. In applying this rule in the instant case the Circuit Court of Appeals said (R. 223):

> "* * * At the time of the grant, the land was farm land and the strips here involved were long and narrow, but relatively small in acreage. Although the grantor was willing to surrender dominion of these strips which flanked the track, he saw fit to provide that the railroad was 'to have and hold the land for railroad purposes only.' It would seem reasonable that the grantor meant the railroad could use the strips, but only for the expressed purposes. Such an interest to the railroad could 'well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee * * *.' *Waller* v. *Hildebrecht*, 295 Ill. 116. The words in the habendum were more than descriptive of purpose; they were the essence of the whole grant made by Camp; they were intended to describe the estate. We must therefore hold that the Camp deed gave the railroad only an easement."

Petitioners also contend that a designation of "use" could not denote tenure because the "use" is a privilege of the holder of the fee as well as a grantee of the easement. This argument ignores the well-established rule of *Waller* v. *Hildebrecht*, 295 Ill. 116, where the Illinois Supreme Court said (p. 121):

> "Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."*

* This language was approved in both the *West* case (374 Ill. 516, 520-521) and the *Tallman* case (379 Ill. 441, 452).

In the case now before this Court a particular or special right or easement in the grantee to use the land conveyed for railroad purposes only "may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor" from whom respondents acquired their rights. Railroads are not required to own the fee in order to construct their lines and it is common knowledge that they frequently hold only easements. In fact under the Illinois Constitution a railroad can acquire only an easement by condemnation (Constitution of the State of Illinois, Article II, Section 13). Therefore, the Circuit Court of Appeals, having found an intention to convey only the *use* of the land, correctly held, under the rule of the *Waller* case, that only an easement passed by the Camp deed.

(b) The Illinois Supreme Court's Decisions in Downen v. Rayburn, 214 Ill. 342, Tinker v. Forbes, 136 Ill. 221, and Board of Supervisors v. Patterson, 56 Ill. 111, relied upon by petitioners, do Not Support the Proposition That the Camp Deed Conveyed a Fee.

In the *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, the Illinois Supreme Court after reviewing numerous Illinois cases, including the *West* case, in which it had held that the deeds in question conveyed only an easement, said (pp. 450-452):

> "*In all of these cases words indicative of a use in the nature of an easement were given effect,* though claims were made in *Magnolia Petroleum Co.* v. *West, supra,* that the descriptive words should be disregarded as in the *Patterson* and *Downen* cases. It is to be observed also that in all of these cases the words which were given effect, while perhaps descriptive of a use or purpose, likewise taken by themselves either described an estate or an interest in land less than the entire fee, or limited the estate by the use described or by the language employed.
>
> • • • • •

> "The principle to be derived from the prior decisions of this Court on this question is that words indicating that a *right of way or easement* is granted will limit the effect of words of general warranty, either by being construed as a limitation by express words, or a lesser estate granted or conveyed by construction or operation of law." (Italics ours.)

Thus if the words used in a deed indicate that a *right of way or easement* was intended to be conveyed, those words must be given effect.

Petitioners throughout this proceeding have relied principally upon the *Patterson* and *Downen* cases referred to in the above quotation and the *Forbes* case in support of their contention that the Camp deed conveyed a fee. As pointed out in the *Tallman* case, these cases have a very limited application (379 Ill. 441, 452). In none of them did the language used indicate that a right of way was intended. The deed in the *Patterson* case provided that the lot was conveyed for the purpose of building a court house. The deed in the *Downen* case provided that the land should be used for a church location. The deed in the *Forbes* case provided that the land was conveyed "for the purpose of locating proper water-wheel and races to draw said water." There is a substantial difference between these provisions and the language of the Camp deed, particularly when the language of that deed is considered in the light of the surrounding circumstances. The Camp deed conveyed a narrow strip through a 71-acre tract, which was obviously for a railroad right of way. This was not true of the *Patterson*, *Downen* and *Forbes* cases where building lots were conveyed. Furthermore, the word "only" in the Camp deed clearly evidences an intention to grant the *use* of the land instead of *all* of the land. It should also be noted that the Illinois Supreme Court in the recent *West* case, 379 Ill. 516, held that language very similar to that contained in the *Patterson, Downen* and *Forbes* cases would, under certain circumstances, convey only an easement. (See pp. 17-18, *infra*.) The court below in constru-

ing the Camp deed has never doubted that the language used therein would create merely an easement if the entire deed could be considered in determining the question of the estate granted. In its original opinion it said (R. 214): "* * * the words used in the habendum (of the Camp deed), if given effect, would create an easement only." In its second opinion here sought to be reviewed it said (R. 223): "The words of the habendum (of the Camp deed) were more than descriptive of purpose: they were the essence of the whole grant made by Camp; they were intended to describe the estate. We must therefore hold that the Camp deed gave the railroad only an easement." No other conclusion is possible on this record and under the *Tallman* and *West* cases it would be error to ignore the language referred to.

The petitioners also refer to the cases of *Phillips Gas & Oil Co.* v. *Lingenfelter,* 262 Pa. 500, and *Quinn* v. *Pere Marquette Ry. Co.,* 252 Mich. 143, as establishing the proposition that the words "for railroad purposes only" are nothing more than a statement of the purpose of the conveyance. These cases are contrary to the great weight of authority in this country. 22 R. C. L. 868; 51 C. J. 571, Sec. 235; *Ronbauer* v. *St. Louis & San Francisco Ry. Co.* (Mo.), 34 S. W. (2d) 155, 157; *West Texas Utility Co.* v. *Lee,* 26 S. W. (2d) 457, 458.

(c) Even Assuming the Language of the Camp Deed Is Ambiguous (Which We Do Not Admit), the Circuit Court of Appeals Correctly Found That the Camp Deed Conveyed Only an Easement Under the Doctrine of Magnolia Petroleum Co. v. West, 374 Ill. 516.

The facts and decision of the Illinois Supreme Court in the recent case of *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, are stated in the following quotation from the court's opinion (pp. 523-524):

> "* * * The words of limitation in the deed from Bettie Francis to August Wiese, as applied to the

conveyance of a narrow strip running along the edge of the grantor's property from the road to the land of the grantee, discloses an intention to grant merely a right of way, and the words 'convey and warrant' are as compatible with this intention as with the conveyance of a fee. The language of limitation, 'to be used for road purpose,' is ambiguous. *Surrounding circumstances and the objects of the parties fortify the construction that an easement was intended.* The location of the Wiese property, having no connection with the road, the use of the Francis tract as a means of access, and the position of the strip, not adjoining the grantee's other tract, so that it might be utilized as more than a roadway, all compel this conclusion. *Moreover, Wiese and his heirs have interpreted the deed in accordance with this evident intention.* They did not cultivate, but used the strip only as a road. In various inventories and the lease to T. R. May, purporting to cover all of their interests in section 15, they asserted no title to the strip, and in an amended inventory, filed after the execution of the Hamilton lease, claimed an interest in it only as a roadway. *The language of the deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties clearly disclose an intention to grant no more than an easement.*" (Italics ours.)

Thus the court found that language in that deed less restrictive than that in the Camp deed would, under certain circumstances, restrict the grant to that of an easement. In other words, where the "surrounding circumstances," the "objects of the parties" and the subsequent acts of the parties and their successors tend to show that an easement only was intended such facts will be taken into consideration and given effect.

The present record contains abundant evidence on these points, all of which support the conclusion that the words "for railroad purposes only" in the Camp deed were intended to limit the grant to an easement. In 1863, when the Camp deed was made, the Camps owned the land con-

veyed as well as the land on both sides of that land, a total of 71 acres (R. 95). On November 20, 1865, they conveyed the entire 71-acre tract of land to Lysander C. Jacoby (R. 100-103). This conveyance described the entire tract by metes and bounds and therefore included the strips of land mentioned in the Camp deed. *Excepted from the warranty of this deed but not from the conveyance* were "certain rights of the railroad in 1.15 acres thereof."

On December 20, 1870, the Jacobys made a deed to the Chicago & North Western Railway Company (R. 103), the successor of the grantee in the Camp deed, which conveyed, "*for the uses and purposes hereinafter stated and none other,* * * * A strip of land * * * along the westerly side of the center line of the track of said railway *as now laid down and used* by the party of the second part *upon the hereinafter described premises of the grantors,* * * * said strips of land to extend from said half section line to the southern line of the grantor's premises *whereof they are parcel* * * *." (Italics ours.) The deed then states that the railroad is "to have and to hold the said strips of land above specified and described unto the party of the second part, its successors and assigns for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken and held by condemnation under the statute, and subject also to all obligations and liabilities imposed on railroad companies respecting land taken and held by such condemnation." This deed covered substantially all of the land conveyed by the Camp deed plus some additional property.

On September 3, 1877, the Jacobys conveyed the entire 71-acre tract, including the railroad right of way, to their daughters without any reservation as to the rights of the railroad (R. 108). On August 3, 1904, one daughter conveyed her interest in the entire tract to the other without any reservation (R. 110). On March 2, 1905, Mary Ella Jacoby Hall conveyed the entire tract to respondent Cat-

lin and respondent Hicks' predecessor, strangers to the Jacoby family, and carefully provided that the conveyance was "subject to the rights of the Chicago & North Western Railroad" (R. 112).

It thus appears that the Camps, their successors in title and the railroad, in subsequent conveyances, all treated the interest of the railroad in the land described in the Camp deed as an easement only. It is particularly important to note that the railroad in 1870 accepted another deed covering substantially all of the property described in the Camp deed and in that deed, which clearly conveyed an easement only,* acknowledged that it was acquiring rights "upon the hereinafter described premises of the grantors." If it had thought it had obtained a fee to this land in 1863 through the Camp deed it certainly would not have made this admission.

At the time the Camp deed was given the railroad tracks were already laid on the land described therein (R. 98). In addition the deed contained covenants regarding cattle fences and grade crossings. It is obvious that the property was intended to be used for right of way purposes. Even where a deed of general warranty conveyed to a railroad company all land lying within 50 feet of the main track, without any reference to the purpose of the conveyance or other language indicating that it was for a restricted use, such facts have been held to necessitate that the deed be construed as conveying merely an easement of right of way. See, *e. g.*, *Abercrombie* v. *Simmons*, 71 Kans. 538, approved in *Branch* v. *Central Trust Company*, 320 Ill. 432, 442-443, and *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, 451. Consequently, even if there is any ambiguity in the phrase "for railroad purposes only" con-

* Section 13 of Article II of the Constitution of the State of Illinois of 1870, which was in effect at the time the deed referred to was given provided: "The fee of land taken for railroad tracks, without the consent of the owner thereof, shall remain in such owners, subject to the use for which it is taken." The deed in question expressly provided that the grantee was to have only the estate it would have obtained through condemnation.

tained in the Camp deed, the above facts make it clear that it was intended to grant only an easement, and, under the *West* case, it should be so construed.

Petitioners in an effort to find something to support their contentions point to the notary's certificate. It will be noted from examination of the Camp deed (R. 98) that it was apparently made out on a printed form with several interpolations and that the provisions of the notary's certificate were merely the formal statements required under the Illinois law at the time the deed was executed. The purpose of the language which the petitioners quote and rely upon at page 19 of their brief is obviously that of showing that Mary A. Camp executed the deed voluntarily and not under the compulsion of her husband. Since the certificate states that Mary A. Camp acknowledged that she released her rights "to the lands and tenements therein mentioned," in order to determine in what property she released her rights it is necessary to refer back to the body of the instrument. The language referred to by petitioners does not purport to, nor could it, increase the estate conveyed in the body of the instrument.

II.

THE USE OF THE PROPERTY IN QUESTION BY A LESSEE FROM THE RAILROAD FOR A RETAIL GASOLINE FILLING STATION IS NOT A PROPER USE.

Petitioners' statement of the question before the Circuit Court of Appeals with respect to the railroad's right to lease the premises in question for a retail gasoline filling station is obviously erroneous. They wholly fail to recognize the difference between "holding" land in fee and holding an easement only. The question in reality was: May a railroad which owns an easement to use property for railroad purposes only lease it to a private business concern for use as a retail gasoline filling station and thus cast an additional burden upon the servient estate? It was

this question that the Circuit Court of Appeals answered in the negative.

The Circuit Court of Appeals found that "The evidence clearly discloses that the use of the leased premises is for an ordinary retail gasoline filling station, * * *" (R. 224). This conclusion is not questioned by petitioners. Nor could it be. The photographs introduced as Trustee's Exhibits B, C, E, and F (R. 137, 139, 141, 143), show that the premises are presently being used for a retail gasoline filling station by a private concern. The tanks located on the leased premises are old tank cars set on concrete blocks. They are not bulk station tanks. There are no loading racks or pumps for loading gasoline out of these tanks. The tanks bear a notation that the station is a "tank car station" and are used only for advertising and for the storage of reserve gasoline for the adjoining retail station. No conclusion other than that reached by the Circuit Court of Appeals is possible on this record.

(a) The Circuit Court of Appeals Correctly Followed the Rule Approved in R. I. & P. Ry. Co. v. Leisy Brewing Co., 174 Ill. 547, in Determining That the Use of the Property in Question for a Retail Filling Station Is Not a Railroad Use.

It is inconceivable that the rule is, as contended by petitioners, that a railroad holding land under an easement for railroad purposes only could use the land either directly or indirectly for any other purpose no matter how foreign to the operation of a railroad, so long as it claimed that it might some day find some railroad use for the property. As pointed out by the Circuit Court of Appeals in the case now before this Court to so hold "would be an open invitation to abuse." (R. 225.) Thus in *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, the Illinois Supreme Court, quoting from *Lance's Appeal*, 55 Pa. St. 16, said (p. 559):

> "No one can pretend that a railroad company can build private houses and mills, and erect machinery,

not necessarily connected with the use of their franchise within the limits of their right of way. If it could, stores, taverns, shops, groceries and dwellings, might be made to line the sides of the road outside of the track,—a thing not to be thought of under the terms of the acquisition of the right of way."

Although this quotation refers to the railroad's own action, obviously a railroad owning only an easement to use property for railroad purposes cannot validly authorize a use of this property for other than railroad purposes. Thus in 22 R. C. L. p. 868, Sec. 116, it is stated:

> "Where a railroad right of way is granted by deed defining and limiting the easement granted, the railroad company cannot acquire any greater rights or interest in the land *or subject it to a heavier burden or more extensive easement than the deed passes or authorizes, and it can vest in another only such right as it has itself acquired.*" (Italics ours.)

The Illinois Supreme Court, in the *Leisy Brewing Co.* case, stated that it had no doubt as to the correctness of the rule quoted from *Lance's Appeal,* although it found it inapplicable to the case then before the court. Petitioners here are contending for the precise rule which the court there observed "no one can pretend" to be the rule.

(b) The Cases of People v. Pullman Palace Car Co., 175 Ill. 125, Dauchy Iron Works v. Grunder, 150 Ill. App. 604, and Dickman v. Madison County Light Co., 304 Ill. 470, Cited by Petitioners, Are Inapplicable to This Case.

People v. *Pullman Palace Car Co.,* 175 Ill. 125; *Dauchy Iron Works* v. *Grunder,* 150 Ill. App. 604, and *Dickman* v. *Madison County Light Co.,* 304 Ill. 470, relied upon by appellees, have no application to this case. The *Pullman Palace Car* case was a *quo warranto* proceeding brought by the State to question the right of the railroad company, under its charter, to own certain property. In the *Dauchy* case a lessee defended a claim for rent on the ground that

the lease was *ultra vires* the lessor corporation. The questions involved in those cases are obviously different from that here involved. In the *Dickman* case the property in question was being used by an electric railroad for a power plant which was unquestionably a railroad use, and the only question was whether the power produced in excess of the company's present needs could be sold until needed by the railroad company. In that case the property in question at the time of the proceeding was being used for a railroad purpose primarily, while in our case the property in question is leased to the owner of a retail gasoline filling station and is not in any sense being used for a railroad purpose. This distinction was recognized by the Circuit Court of Appeals in its opinion of April 8, 1942, where it said (R. 225):

> "In the instant case the filling station was not an incident of the legitimate use of the easement; it was the use itself."

CONCLUSION.

For the foregoing reasons we respectfully submit that the Circuit Court of Appeals correctly held that under the Illinois law the grantee in the Camp deed acquired only an easement to use the property in question for railroad purposes, and that the present use of the property by the railroad's lessee for a retail gasoline filling station is not such a use. The petition for certiorari should therefore be denied.

Respectfully submitted,

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